PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

961282 OCT 15 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

October Term, 1996

LESTER DANIELS, JR.,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

CORRECTED PETITION FOR WRIT OF CERTIORARI

SAMUEL W. CRUSE
Attorney for Petitioner
Post Office Box 212020
Augusta, Georgia 30917
(706) 650-3100

QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Court apply the concept of nexus correctly in upholding the decision of the lower court.

2. Was the penalty imposed upon the appellant appropriate for the offense in consideration of the years of service and the record of the appellant?

PARTIES TO THE PROCEEDING

Petitioner, Lester Daniels, Jr., is a resident of Macon, Georgia. He was the Plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Federal Circuit.

Respondent, United States Postal Service is a Federal Agency, existing by virtue of the laws of the United States of America. Respondent does business in every state in the United States. Respondent was the Defendant in the lower court proceedings and was the Respondent before the United States Court of Appeals for the Federal Circuit.

There are no other parties to this action.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Statute Involved 1

Statement of the Case 1

Reasons for Granting the Writ 5

I. Certiorari should be granted to clarify whether the Appellate Court incorrectly applied the concept of nexus in upholding the decision of the lower court.

II. Certiorari should be granted to determine whether or not the penalty imposed upon the appellant was appropriate for the offense in consideration of the years of service and the record of the appellant.

Conclusion 18

TABLE OF CITATIONS

CASES: Page

Beardlsey v. Department of Defence,
55 M.S.P.R. 504, 510 (1992),
affirmed 5 F.3d, 1504 8
Douglas v. Veterans Administration,
5 M.S.P.R. 280, 307-08 (1981) 6,7
Gwynn v. U.S. Postal Serv.,
MSPB 1985, 29 M.S.P.R. 460 9
Hathaway v. Merit Systems Protection Bd.,
981 F.2d 1237 (1992) 11
Luna v. Department of Army,
38 M.S.P.R. 696 (1988) 9
Mauro v. Department of the Navy,
35 M.S.P.R. 86, 94 (1987) 18
Richard v. Department of Air Force,
MSPB 1990, 43 M.S.P.R. 303, affirmed
918 F.2d 185 8
Uske v. United States Postal Service,
60 M.S.P.R. 544, (1994) 11
Weston v. U.S. Dept. of Housing and
Urban Development, 724 F.2d 943 (1983) . . 8

STATUTES:

5 U.S.C. 7513(a) 6

No. _____

In The

Supreme Court Of The United States

October Term, 1996

LESTER DANIELS, JR.,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

CORRECTED
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On July 15, 1996, the United States Court of Appeals for the Federal Circuit issued its opinion, affirming the decision of the Merit System Protection Board.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Federal circuit and it's judgment of July 15, 1996. That judgment affirmed the Merit Systems Protection Board's affirmation of the Agency action of Appellant's removal from his employment. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C. § 7513(a) : Cause and procedures

(a) Under regulations prescribed by the office of personnel management, a city may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

STATEMENT OF THE CASE

In the initial decision by the Administrative Judge, the Honorable Richard W. Vitaris, the Judge affirmed the agency action. (A.4) Mr. Daniels was removed from his position of City Carrier at the Macon Post Office in Macon, Georgia, effective thirty days from December 13, 1994. The action was based on two specific charges: (1) submitting false information on form CA-8, "claim for continuing compensation on account of disability"; and

(2) submitting false information on form CA-1032. (A.25-A.26 and A.27-A.32)

The Appellant joined the U.S. Postal Service in June, 1969. He served as an employee up until the time that he was removed under the proposed removal of December 13, 1994. (A.33) At the time of his proposed removal, he served as a City Letter Carrier at the Macon, Georgia Post Office.

The circumstances leading up to his removal involve a series of events beginning with an on-the-job injury. On November 16, 1988, Mr. Daniels suffered an on-the-job injury which was reported to the Office of Workers' Compensation with the Postal Service in Macon, Georgia. As a result of his suffering the on-the-job injury, the Appellant was operated on in his lower back on February 24, 1989. Mr. Daniels applied for an received benefits from the Office of Workers' Compensation Programs from December 17, 1988 until October 1, 1990. Mr. Daniels returned to work on a part-time basis, four hours a day, on June 5, 1990.

During the period that Mr. Daniels was recuperating from the surgery of February 24, 1989, he was introduced to Mr. Norman Adamson, Sr., the Post Master of Macon, Georgia. Mr. Daniels possessed a real estate license during the time-frame he was receiving Workers' Compensation benefits but had applied for and been accepted for the license many years prior to the incident in question.

In the proposed removal of December 13, 1994 (A.33), which was upheld by Walter E Flanagan, Manager of Human Resources, in his letter of January 23, 1995 (A.41-A.43), Mr. Daniels was charged, on charge 1, of submitting a form CA-8 for continued compensation

on account of disability dated October 27. 1989. Specifically under item 9 of that form (A.25-A.26), section 9(b) states: "commissions and self-employment, whereby the person receiving compensation benefits, should show all activities whether or not any income resulted their efforts." In the first charge in the Notice of Proposed Removal to Mr. Daniels, who was charged with sending a solicitation letter to Mr. Tommy Caruthers, there is no evidence that he received compensation, commission or self-employment as a result of that letter to Mr. Caruthers. (A.35) In fact, the investigation showed that a gift was given to Mr. Daniels by Ms. Cyndi Haskins, who had sold Mr. Caruthers a house. (A.37-A38) The basic allegation in regard to charge 1 against Mr. Daniels is that he received a sales commission of $1,568.00 from a sale of a house to Mr. Norman Adamson, the Post Master of Macon, Georgia. Mr. Norman Adamson purchased a house from William and Annie Hampton, which closed on November 15, 1989. (A.36) As a result of that purchase of property, located at 4198 Meadowbrook Drive, Macon, Georgia 31204, a commission of $3,136.00 was paid to Smith Realty and $2,424.00 was paid to Sheridan, Solomon, Kernaghan Realtors of Macon, Georgia. (A.44-A.48 & A.54-A.55) Cyndi Haskins was the listing agent for 4198 Meadowbrook Drive, Macon, Georgia. Although Ms. Haskins stated that Mr. Daniels was the listing agent for that address, evidence was not elicited that showed that Mr. Daniels was a member of that multiple listing service. Ms. Haskins provided information, which was marked as Inspection Service Exhibit "3", which was the investigative memorandum by the Postal Inspectors, in her own writing stating that Lester Daniels was a salesperson but there were no documents to show that Lester Daniels was in fact the salesperson or listing agent on the property in question. (A.36-A.39 refute that) The check for commission on the sale written at the closing

on November 15, 1989 in the amount of $3,136.00, was made payable to Smith Realty and not to Lester Daniels. (A.54-A.55)

Sherrill Smith, who was the assumed owner of Smith Realty, made a statement that Lester Daniels was a part-time salesman with Smith Realty and Auction from December 17, 1988 to February 7, 1991. (A.49-A.53) Mr. Smith received the commission of $3,136.00 in a check that was made payable to Smith Realty at the closing of Mr. Adamson's house. (A.54-A.55) According to Mr. Smith's statement, Lester Daniels negotiated this sale but, in fact, the sales commission was paid to Smith Realty not Mr. Daniels. The benefactor of the payment was Mr. Sherrill Smith, the owner of Smith Realty and Auction. The charges against Mr. Daniels, in charge 1 of the proposed removal (A.33-A.34), state that on October 27, 1989, Mr. Daniels falsified information when he submitted information for continuing compensation but did not show the commission earned from the sale and self-employment. There is no evidence whatsoever to show the transmittal of monies from Sherrill Smith except as found in the statement of Sherrill Smith. (A.49-A.53) The CA-8 which Mr. Daniels is charged with falsifying was submitted on October 27, 1989. (A.25) The closing of the house in question occurred on November 15, 1989. (A.44-A.49) That check to Smith Realty in the amount of $3,136.00 dated November 15, 1989 is incompatible with the charges against Mr. Daniels. (A.54-A.55) Mr. Daniels was charged with falsifying a form dated October 27, 1989 by not listing a commission when, even if he had received a gift from Mr. Smith as a result of the sale of the house by Mr. Smith to Norman Adamson, it would not have occurred until sometime after November 15, 1989. The charge in itself is thoroughly defective because of the date it refers to. Additionally, the fact that Mr. Sherrill Smith provided

Mr. Daniels with a gift as a result of Mr. Smith's sale of the house to Mr. Adamson, it would be considered a gift and not a commission in self-employment.

The second charge in the Notice of Proposed Removal involved Mr. Daniels submitting false information on a CA-1032 form. (A.27-A.32) The charge concerned an allegation that the Appellant did not reveal a referral fee from the aforementioned transaction and failed to reveal his receipt of VA benefits.

The Court of Appeals for the Federal Circuit affirmed the holding of the Merit Systems Protection Board on July 15, 1996 in a published opinion.

The Court of Appeals upheld the decision of the Administrative Judge that Appellant was guilty of the charges made against him. The Court of Appeals decision attributed the decision of the Administrative Judge to finding that the Appellant lacked credibility.

The Court of Appeals also rejected the Appellant's allegation that the penalty imposed by the agency was inappropriate considering the offense and the evidence. The Court of Appeals found the decision to not be an abuse of discretion.

The case was properly before the Court of Appeals under a jurisdictional grant of 28 U.S.C. § 1291.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO

CLARIFY WHETHER THE APPELLATE COURT INCORRECTLY APPLIED THE CONCEPT OF NEXUS IN UPHOLDING THE DECISION OF THE LOWER COURT.

This issue presents an important federal question which implicates the proper application and parameters of the concept of nexus. The Agency failed to establish the proper nexus and such failure renders the Agency's action as clearly improper.

It was the obligation of the Agency to show that the penalty promoted the efficiency of the Postal Service under 5 U.S.C. ¶7513(a). The first element of this standard is nexus. Douglas v. Veterans Administration, 5 M.S.P.R. 280, 307-08 (1981). In finding nexus the Agency must show that the offense is related to the offending party's work. In this case, the offense related to alleged falsification of two separate Department of Labor forms. The se allegations have been vigorously disputed by the Appellant.

Even if these allegations were to ring true, the correctness of completing a Department of Labor form in no way reflects on Appellant's job. These allegations in no way relate to Appellant's job. The charges relate to separate and distinct activities wholly removed from Appellant's job. Under no stretch of the imagination, no matter how absurd, can these charged be said to relate to the Appellant's job.

Indeed, any right to impose a penalty for the alleged falsification of these forms belonged to the Department of Labor, not the Agency. The Department of Labor possessed the right to decrease compensation or to act in a manner appropriate for the alleged offense. The Agency clearly exceeded their authority to act concerning a matter that did not have a nexus to the

Appellant's job.

Therefore, since they are totally unrelated to Appellant's job, the necessary nexus required has not been met, and this court should grant review of this issue in order to clarify the proper parameters of the concept of nexus.

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER OR NOT THE PENALTY IMPOSED UPON THE APPELLANT WAS APPROPRIATE FOR THE OFFENSE IN CONSIDERATION OF THE YEARS OF SERVICE AND THE RECORD OF THE APPELLANT.

Even if the concept of nexus was properly applied, the Agency was required to prove that the penalty was reasonable under the particular circumstances of the case. Douglas v. Veterans Administration, 5 M.S.P.R. 280, 307-08 (1981). Termination of an employee of such lengthy service for the offense charged, is clearly disproportionate. This court should grant review of this important federal question in order to properly address the issue of severity of the penalty imposed by this federal agency.

The agency charged the Appellant with two specific charges in the proposed removal. The charges should not have been sustained and, in fact, Charge 1 was totally flawed in that it charged Appellant with an activity which could not have occurred on the date in question, October 27, 1989. Since that charge should not have been sustained whatsoever, it was the obligation of the Board to make an independent evaluation to determine whether the sustained charges merited the

penalty imposed by the Agency. See Beardsley v. Department of Defense, 55 M.S.P.R. 504, 510 (1992), affirmed 5 F.3d, 1504. The decision of the Court of Appeals upholding the penalty is unreasoned and void of any factual analysis.

In using the substantial evidence standard, a finding by the Merit System Protection Board that the Agency's termination of the Employee would promote proficiency in the Agency is a factual finding which is to be sustained on appeal unless that Administrative determination not supported by a least substantial evidence from the record taken as a whole. It is the contention of the Appellant in this case that there is not substantial evidence on taking the record as a whole in regard to the Appellant and, therefore, the argument by the Agency that the action taken promoted efficiency of the Agency is flawed. The Appellant was maintained in a position of trust for nearly 5 years after the alleged incident was supposed to have occurred. The promoting of efficiency within the Agency does not meet muster in regard to the substantial evidence test. Weston v. U.S. Dept. of Housing and Urban Development, 724 F.2d 943 (1983).

The Merit Systems Protection Board's purpose was to review the agency-imposed penalty only to determine if the agency considered all relevant factors, and the agency exercised its management discretion within tolerable limits of reasonableness. In the specific case before the Court, it is contended that, considering the relevant factors, the Agency did not properly exercise management discretion within the limits of reasonableness and, therefore, the removal should not have been sustained. Richard v. Department of Air Force, 43 M.S.P.R. 303, affirmed 918 F.2d 185.

Since the issues in the present case involve an action that occurred in 1989 and 1990 and it was not investigated in excess of 4 years, the staleness issue as well as the offense itself appear to be grossly disproportionate to the offense. Since the penalty is grossly disproportionate to the offense which is alleged to have occurred in light of the particular circumstances of this case, the Agency abused its discretion. As the Board has stated, when the penalty is grossly disproportionate to the offense in light of the particular circumstances of the case, abuse of Agency discretion has been found. Luna v. Department of the Army, 38 M.S.P.R. 696.

In regarding the Agency's decision, the statute provides that the Agency's decision does not prevent the Board from reducing the Agency's chosen penalty when it determines that the choice did not reasonably reflect consideration of all potential mitigating circumstances. It is the contention of the Appellant in this case that the fact that it required the Agency 4+ years to investigate which kept him in a position of trust for 4+ years for them to investigate the charges, made the case stale and, therefore, resulted in a mitigating factor which should have prevented removal of the Appellant from his position as a Letter Carrier for the Postal Service. The Board should have reduced the penalty provided by the Agency considering all mitigating circumstances. See Gwynn v. U.S. Postal Service, 29 M.S.P.R. 460.

The Agency also contends that the action promotes the efficiency of the service. (A.11) There is a basic question in regard to this issue. The Appellant is accused of falsifying documents in October, 1989, and early 1990. (A.25-A.32) He continued to work with the Postal Service for almost 5 years and was subjected to signing official documents for that 5 year period. Whether or not this action promotes efficiency of service

is totally inconceivable that the Postal Service can allege that the action by the Agency promotes efficiency of the service. Falsification involves a creditability issue that is based upon the testimony of Walter Flanagan, that the Appellant, operating as a Letter Carrier, occupied a position of public trust. If the Postal Service, the Agency in this case, can argue that Mr. Daniels occupied a position of public trust then it was totally derelict for them to leave him in that position of public trust for nearly 5 years time after the Postal Service gained knowledge of the issue. The Agency evidently investigated this issue for 4+ years and during that time frame, the Appellant was performing his duties in a satisfactory manner. The Administrative Judge stated that public trust constituted a significant mitigating factor. (A.11) It is the contention of the Appellant that the Administrative Judge should have considered the removal penalty outside the bounds of reasonableness based upon the staleness and the confusion of the issue.

"Substantial evidence" within the meaning of the statute permitting the Court of Appeals to set aside an order of the Merit Systems Protection Board if unsupported by substantial evidence if such relevant evidence would be such that a reasonable mind might accept as adequate to support conclusion. In this specific case, the Appellant contended that the money he received from Smith Realty was in fact a finder fee and that the commission paid actually went to Smith Realty and Auction Company from which Mr. Smith gave him a finders fee. Because of this it would not be considered commission. Because of the ambiguity of the definition of commission or salary as compared to a finders fee, the charge against the Appellant should not be considered substantial in regard to the falsification of the CA-1032 charge under Charge 2. Charge 1 was totally inconceivable in that there was no substantial evidence

to show that on October 27, 1989, Mr. Daniels had falsified anything. He did not receive any compensation, even if you do consider the referral fee a commission or salary, until November 15, 1989. How can he be charged with falsifying a form on October 27, 1989 when in fact he had received nothing as of that date. Therefore, using the substantial evidence standard, the Court of Appeals should set aside the Merit System Protection Board finding using that standard. See Hathaway v. Merit Systems Protection Bd., 981 F.2d 1237 (1992).

The proposed removal letter and the Administrative Hearing held in regard to the proposed removal deals with the credibility of witnesses. The Appellant should have been declared credible on specific points and therefore the remainder of his testimony which was discounted because the Administrative Judge did not declare him credible, should be credible. The fact that a witness may not be credible on one point does not necessarily mean that the remainder of the testimony lacks credibility. See Uske v. U.S. Postal Service, 60 M.S.P.R 544 (1994). While credibility is always an issue that the Court must confront, it is far from the only issue involved in this matter. Credibility aside, the facts of this case simply do not support the findings made by the Administrative Judge.

It is inconceivable, as far as charge 1 is concerned, that Mr. Daniels was charged with falsification of a CA-8 on October 27, 1989. (A.25-A.26) The allegations of the Agency whereby Mr. Daniels' falsified his form CA-8 are not substantiated since Mr. Daniel did not receive income during that time period. Mr. Daniels received no monies that were reportable on the CA-8 of October 27, 1989. There was no evidence to show that prior to or leading up to October 27, 1989, the date of the CA-8 form, that Mr. Daniels had received compensation in any

form which would have been reportable as commission or self-employment on the CA-8. Although the Agency contended that Mr. Daniels received a sales commission for his efforts, the evidence does not show that there was a sales commission received by Mr. Daniels prior to or on October 27, 1989, the date that he completed the CA-8 form. (A.25-A.26) In that Mr. Daniels is charged with falsification on that specific date, he must be found not culpable. The check to Smith Realty has a November date and therefore, the allegations by the Agency in regard to Charge 1, falsification of the CA-8, should not have been upheld. (A.54-A.55) Mr. Daniels did not deny that he assisted Mr. Adamson in the purchase of his home or the fact that he sent a letter to Mr. Caruthers. Mr. Daniels states that failure to list the activities on the CA-8 form was an innocent mistake because he did not understand the form and had not received any money. The basic problem with Charge 1 is the fact that he is charged with a specific event on a specific date, October 27, 1989, which had not occurred. If the Appellant had received any compensation whatsoever as of October 27, 1989, and had it been shown that it was more than a casual mistake, then the Agency might have been able to prove the Charge. The error in the Judge's decision in regard to Charge 1 is the fact that prior to or on October 27, 1989, the Appellant had received nothing whatsoever in regard to a gift or monies from Mr. Smith to list on the CA-8, therefore, he could not have claimed any money as commission or self-employment.

The sales agreement to sell the house to Mr. Adamson, signed by the Sellers and by Norman Adamson, Sr., showed a sale by Cyndi Haskin of Sheridan, Solomon, Kernaghan Realtors. (A.56-A.57) According to the statement of Mr. Sherrill Smith, Mr. Smith admitted receiving the check for $3,136.00 for the commission. The fact that he might have given Mr.

Daniels $1,568.00 sometime after November 15, 1989 does not in any way substantiate the charge, under Charge 1 against Mr. Daniels, of falsifying his CA-8 prior to the fact on October 27, 1989. Furthermore, Mr. Daniels considered the money paid by Mr. Smith a referral fee and not a commission. Therefore, he did not understand that the referral fee was supposed to be a commission that should have been reported on a CA-8. It is still a contention of the Appellant that it was inconceivable that he could report a commission on October 27, 1989 when, in fact, the referral fee, which he did not consider as a commission, did not occur until after the fact, on November 15, 1989. One can be involved in solicitation of business in regard to real estate but that does not necessarily appear as self-employment. There was no evidence whatsoever in the form of W-2's or 1099's submitted to the IRS, by Smith Realty or on behalf of Mr. Daniels, which would show any inclination of income from the sale of property. The only information provided was that of the closing documents from the sale of the home to Mr. Adamson and that did not show the Appellant as the benefactor of any commission. A person is capable of rendering professional services without even leaving the telephone. If the issue, in regard to the falsification of information submitted on the CA-8 of October 27, 1989, involves Mr. Daniel's failure to improperly complete sections 9(a) and 9(b) of that form, then one must look at the form itself to specifically show that Mr. Daniels claims only 160 hours of wage loss from September 9, 1989 until October 6, 1989. (A. 25-A.26) Although Mr. Daniels submitted that form on October 27, 1989, there is no evidence whatsoever that he received compensation prior to filling out the form, either as a salaried employee or a commissioned employee. If he received a referral fee from Mr. Smith for the sale of the house to Mr. Adamson in November of 1989, then it would have been reportable

on any CA-8 form Mr. Daniels which would have submitted in November, 1989, specifically, sometime after the closing of the house to Mr. Adamson and the payment of the commission check to Sherrill Smith of Smith Realty and Auction Company not on the October 27, 1989 form. If that happened, at that point, it might be shown or alleged that Mr. Daniels submitted improper information under 9(b) of the CA-8 form.

It is totally inconceivable that the Agency could have made such a regrettable error and that the Judge would uphold such an error, since during the time frame of compensation from September 9, 1989 until October 6, 1989, as claimed on the form CA-8 and the time period in question, there was no compensation received by Mr. Daniel or at any time covered on the form. The actions of the Agency, in regard to this particular charge against the Appellant, are tantamount to charging a person with forging a check one month before the check was ever written. Although Charge 1 is fatally flawed in that it talks about a time period of compensation when Mr. Daniels received no commission or salary, he is charged with falsifying the form. In order to establish the intent to falsify such a form on October 27, 1989, there must be an actual falsification on October 27, 1989 which covers the period of September 9, 1989 until October 6, 1989. We must then go to the basic issue of whether or not a referral fee paid to Mr. Daniels would have been a commission. Mr. Daniels contended that he was innocent in that he did not understand the issue. If the Postal Service had charged Mr. Daniels with falsifying a CA-8 that was submitted in November, 1989, instead of the October 27, 1989 submission and if Mr. Daniels had received a referral fee from Smith Realty and Auction from the sale of Mr. Adamson's house, then the court would then be required to look at whether or not the referral fee was in fact a commission. It is a common

business practice for persons to receive referral fees for anything. In fact, that practice is common in most business circles. The fact that Smith Realty and Auction received the check as the commission from the sale in the amount of $3,136.00 then any gift by Mr. Smith to Mr. Daniels would in fact be a referral fee and not a commission.

It is the contention of the Appellant that he was confused when he attempted to complete the CA-1032 form. This specific form in question, CA-1032, was included as an Exhibit in the investigation of Mr. Daniels. That specific form is dated April 30, 1990. With all due respect to the government, from counsel for the Appellant's experience with the government, it would take a Philadelphia lawyer in some respects to fill out some of the forms required. The specific form in question, CA-1032 (A.27-A.32), is in essence a survey form that was filled out by the Appellant. The form itself involves a Part A whereby the Appellant was charged with falsifying information by not reporting income. The Appellant failed to correctly fill out A.1.(b) because he wrote "n/a." The Appellant did not consider himself to be self-employed by Smith Realty and Auction Company, although he did receive gratuitously an amount from the sale of a house to Mr. Adamson sometime after November 15, 1989, but he considered this a finders fee or referral. As far as Part C.2., whereby he was asked questions concerning VA benefits, the Appellant had been informed by Ms. Donna Chatham that it was not necessary to report information already in his file. The Postal Service has the resources to understand and realize that the Appellant was a compensable veteran and, in fact, these forms are in his personnel file from the day he was hired. The fact that he was a compensable veteran was information that was already accessible to the Postal Service and, therefore, it is the contention of

the Appellant that he did not understand that he was to report this information which was already at the hands of the agency.

There was no definition by the Administrative Judge in regard to the referral fee and whether or not that referral fee should have been considered compensation or commission as required by the CA-8. (A.4-A.14) If counsel for the Appellant were totally disabled and bedridden it is conceivable and most likely probable that counsel for the Appellant could refer persons to a real estate agent and therefore receive a referral fee for the real estate sold without even leaving the house. Since a referral fee is ambiguous and it should not be considered as compensation or commission, then that referral fee should not be considered the subject of falsification on a form CA-8. (A.25-A.26) It must be underlined again that the charge in itself is totally and fatally flawed in that the charge alleges that the Appellant falsified a form submitted October 27, 1989 (A.25-A.26) when in fact no money was received until approximately 18 or 19 days after the fact in the form of a referral fee. It would be tantamount to asking the Appellant to submit a form and project an event in the future. It is the argument of the Appellant that such action by the Agency, and the upholding of the action by the Administrative Judge, was inappropriate and was not grounds for removal. In regard to Charge 2, regarding form CA-1032 (A.27-A.32), and the charge that the Appellant failed to list his real estate activity, it is the contention of the Appellant that his not listing the referral fee should not have been considered falsification. The Administrative Judge noted that Donna Chatham said that she had never told the Appellant not to list his VA benefits on form CA-1032. It is amazing that Ms. Chatham can remember a specific conversation with the Appellant when in fact she handles so many compensation cases for the entire whole Macon

Sectional Center which includes approximately 200 Post Offices and the investigation occurred so long after the fact.

The charges against the Appellant were stale and, in fact, it is the argument of the Appellant that an investigation completed by the Postal Inspectors in November, 1994, should have occurred a tremendous period of time earlier. Norman Adamson was the Post Master in Macon, Georgia at the time that he entered into the contract of sale on the house. (A.56-A.57) He was the direct and eventual supervisor of Lester Daniels and should have had knowledge that Lester Daniels was receiving O.W.C.P. benefits at the time that Mr. Adamson bought his home and closed it in November, 1989. The investigation was stale in that this was not a "John Q. Citizen" purchasing the home and, therefore, the Postal Service did not innocently or unobtrusively find out about Mr. Daniels receiving of a referral fee from the sale of the house to Norman Adamson. This was the Post Master of Macon, Georgia Post Office, the eventual supervisor of Walter E. Flanagan, the person who signed the decision letter in 1994 and the manager of Donna Chatham, the O.W.C.P. specialist. The fact that it took the Postal Service nearly five years to take an action against the Appellant makes it stale in itself. The fact that the investigator who was originally assigned the investigation was suffering from poor health in no way excuses the Agency for a five year lapse of time. In fact, it is ironic that the charge, that the Appellant falsified a form, (A.25-A.26) occurred on October 27, 1989, and the first interview on this case was conducted 4 years and 11 months later. It is unfortunate that the investigator who was originally assigned to the case became ill but that makes no excuse whatsoever for keeping an investigation on the shelf collecting dust for nearly five years.

The Administrative Judge cited the case of Mauro v. Department of the Navy, 35 M.S.P.R. 86, 94 (1987) in regard to the issue of staleness, where alleged misconduct had occurred in 1986, but the removal did not occur until approximately 18 months later. (A.10) The Judge states that the Mauro reasoning was fully applicable to the case at bar. It is the contention of the Appellant that the investigation by the Postal Service in regard to his actions does not pass the smell test and therefore, Mauro would not be appropriate. As stated earlier, the person who purchased this house in November, 1989, was the Post Master of Macon, Georgia, not an innocent citizen and, therefore, the Postal Service, if they were so concerned about the falsification issue and the creditability of the Appellant, should have taken immediate action, not take it nearly 5 years later. Anyone can become ill but the fact that a 4 year, 11 month period elapsed means that someone else could and should have been assigned the investigation. The Appellant was left out on a limb, in regard to the allegations, for the nearly 5 year period while he continued to work.

This matter presents an important federal question which this court should grant review in order to clarify the issues involved.

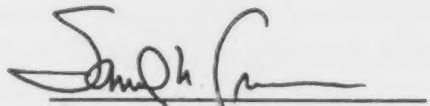
CONCLUSION

Based upon the issues as addressed by the M.S.P.B., the lower court and the appeallant court, the questions as to whether or not the Postal Service has a right to exert or advance an interest held by another federal agency, that agency being the U.S. Department of Labor, is the basic interest in this case. Workers' Compensation Benefits had been afforded to the Petitioner through the U.S. Department of Labor. Because the U.S. Department of Labor had then afforded

the Appellant Workers' Compensation benefits then it would have been the responsibility or the U.S. Department of labor to investigate and determine if the petitioner had violated any rules, regulations, or policies of the U.S. Department of Labor. There is a complete deficiency in the nexus between the events that the appellant was accused of participating in along with the interest of the U.S. Postal Service. The need of the U.S. Postal Service to intervene and assert rights held by the Department of Labor in terminating an employee does not in itself create nexus.

Petitioner submits that this honorable court should resolve the conflict of the U.S. Department of Labor's right to assert its interest not resting with the terminating agency.

Respectfully Submitted,



Samuel W. Cruse
Attorney for Petitioner
Post Office Box 212020
Augusta, Georgia 30917
(706) 650-3100

APPENDIX A

OPINION ANNOUNCING JUDGMENT OF
THE UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
FILED JULY 15, 1996

NO. 95-3788

LESTER DANIELS, JR.

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE

Defendant-Respondent

OPINION ANNOUNCING JUDGMENT OF THE
COURT OPINION FILED AND JUDGMENT ENTERED:
07/15/96

The attached opinion announcing the judgment of the court in your case was filed today. the judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this Court.

FRANCIS X. GINDHART
Clerk

CC: SAMUEL W. CRUSE
DAVID G. KARRO
DANIELS V. USPS, 95-3788
MSPB - AT0752950563I-1

APPENDIX B

DECISION OF THE UNITED STATES
COURT O F APPEALS FOR THE FEDERAL CIRCUIT
FILED JULY 15, 1996

NO. 95-3788

LESTER DANIELS, JR.

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE

Defendant-Respondent

Decided and Filed July 15, 1996

Before: ARCHER, Chief Judge, MICHEL, and SCHALL, Circuit Judges. SCHALL, Circuit Judge.

DECISION

Lester Daniels, Jr., seeks review of the final decision of the Merit Systems Protection Board ("Board"), Docket No. AT-0752-95-563-I-1, sustaining his removal by the United States Postal Service ("agency"). The May 31, 1995 initial decision of the Board on August 10, 1995, when the Board denied Daniels' petition for review. We affirm.

DISCUSSION

Daniels was employed by the agency as a City Letter Carrier in Macon, Georgia. He was removed from

his position for falsification of two Office of Workers' Compensation Programs ("OWCP") forms. The agency alleged that, in October of 1989, Daniels falsified a form CA-8, "Claim for Continuing Compensation on Account of Disability," by writing "N/A" for "not applicable" when he was asked to list commissions and self-employment. The agency contended that the statement was false because, at the time he signed the form, Daniels was engaged in the sale of real estate. The agency also alleged that, in April of 1990, Daniels falsified OWCP form CA-1032, which he was required to fill out in order to continue to receive disability benefits. The agency charged that Daniels falsified the CA-1032 form by failing to list his real estate activity and income, and for stating "N/A" for "not applicable" on a question asking him whether he had received VA benefits from the Department of Veterans Affairs.

Following a hearing, the AJ concluded that the agency had carried its burden of proving by a preponderance of the evidence that Daniels had knowingly supplied incorrect information with the intent to defraud. See Naekel v. Department of Transp., 782 F.2d 975, 977 (Fed. Cir. 1986). The AJ also concluded that the penalty of removal did not exceed the limits of reasonableness. Accordingly, he sustained the removal. This appeal followed.

We review a decision of the Board under a narrow standard. We must affirm the decision unless it is found to be 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) obtained without procedures required by law, rule or regulation having been followed; or 3) unsupported by substantial evidence. 5 U.S.C. §7703(c)(1994); Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984). Daniels makes two arguments on appeal: that the decision of the Board is not supported by substantial evidence; and that the penalty of removal was too harsh.

Neither contention has merit.

The charge that Daniels falsified the CA-8 form was based on the allegations that Daniels assisted in the sale of a home to Norman Adamson, the Macon, Georgia Postmaster, for which he received a referral fee/commission; and that he sent a sales solicitation to Tommy Caruthers, a labor relations specialist with the agency. The charge relating to the CA-1032 form was based on the allegations that Daniels failed to disclose his referral fee from the Adamson transaction and that, as noted above, he failed to state his receipt of VA benefits. Daniels did not dispute that, in completing the forms at issue, he made no mention of his real estate activities and his receipt of VA benefits. Rather, he contended that the omissions were inadvertent. The AJ disbelieved Daniels, however, and credited the testimony of the agency 's Injury Compensation Specialist. In this case, we will not disturb this credibility determination; in general, credibility determinations are "virtually unreviewable." Hambsch v. Department of Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986).[1]

Turning to Daniels' second argument on appeal, we will not disturb the penalty imposed by an agency "unless the penalty is 'so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion . . . ." Villela v. Department of the Air

---

1

Daniels also argues that the finding that he falsified the CA-8 form should be reversed because he signed the form on October 27, 1989, but did not receive the referral fee until November 15, 1989. He argues he cannot be required to have disclosed something he did not yet possess. This argument fails because the AJ found that Daniels earned the referral fee during the period covered by the CA-8. The AJ noted that the form specifically directed Daniels to "[s}how all activities, whether or not income resulted from your efforts."

Force, 727 F.2d 1574, 1576 f(Fed. Cir. 1984)(quoting Power v. United States, 531 F.2d 505, 507 (Ct. Cl. 1976)). We have carefully considered the record and all of Daniels' contentions. Having done so, we are unable to say that the penalty of removal, while severe, was an abuse of discretion.

Each party shall bear its own costs.

APPENDIX C

DECISION OF THE MERIT SYSTEMS PROTECTION BOARD DATED MAY 31, 1996

UNITES STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

LESTER DANIELS, JR., Appellant,	DOCKET NUMBER AT-0752-95-0563-I-1
v.	DATE: MAY 31, 1996
UNITED STATES POSTAL SERVICE Agency.	

Harvey Orr, Atlanta, Georgia, for the appellant.
Jim Jones, Macon, Georgia, for the agency.

BEFORE

Richard W. Vitaris
Administrative Judge

INITIAL DECISION

INTRODUCTION AND JURISDICTION

On February 21, 1995, Lester Daniels timely appealed the action of the agency removing him from his position as a City Letter Carrier with the Macon, Georgia, Post Office effective January 27, 1995. The Board has

jurisdiction over this appeal pursuant to 5 U.S.C. §§7511(a)(1)(B), 7512(1), 7513(d), and 7701(a). The hearing the appellant requested was held on May 24, 1995, at Macon, Georgia. For the reasons stated below, the agency action is AFFIRMED.

ANALYSIS AND FINDINGS

The appellant was removed for falsification of certain Office of Workers' Compensation Programs (OWCP) documents. To sustain the falsification charge, the agency must prove by preponderant evidence [1] that the appellant knowingly supplied incorrect information with the intent to defraud the agency. *See Naeke v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986); *See also Sherwin v. Department of the Air Force*, 44 M.S.P.R. 144, 148, *aff'd*, 918 F.2d 187 (Fed. Cir. 1990) (Table).[1]

1. The appellant falsified his form CA-8.

The agency first alleged that the appellant falsified a form CA-8, "Claim for Continuing Compensation on Account of Disability." it is undisputed that the appellant suffered an on-the-job injury, applied for, and received OWCP benefits. On October 27, 1989, the appellant completed a form CA-8. Item 9 of the form CA-8 directed the appellant to list commissions and self employment. It specifically directed the appellant to"Show all activities, whether or not income resulted from your efforts." The appellant wrote "N/A" for "not applicable" in the appropriate block.

1

Preponderance of the evidence is that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

The agency contends that, at the time he signed the CA-8, the appellant was engaged in the sale of real estate. The agency alleges that the appellant assisted in the sale of a home to Mr. Norman Adamson, then the Postmaster for Macon, Georgia, during the time-frame covered by the CA-8, and that the appellant subsequently received a sales commission for his efforts. The agency further alleges that the appellant sent a sales solicitation to Mr. Tommy Caruthers, a labor relations specialist with the agency, during the relevant time frame.

The appellant does not deny that he assisted Mr. Adamson in the purchase of his home or that he sent a letter to Mr. Caruthers suggesting that he could help Caruthers in the purchase of a home. Rather, the appellant states that his failure to list those activities on the CA-8 was an innocent mistake, brought about by his failure to understand that the disclosure of these activities was contemplated by the form.

The appellant testified that while he had a real estate license, he did not consider himself to be employed in real estate at the time. The appellant testified that the only thing he did to assist Mr. Adamson in the purchase of his home was to refer Mr. Adamson to a real estate agent, for which he received a referral fee. The appellant testified that he did not consider merely referring someone to a real estate agent, albeit a referral which would entitle him to a fee, to constitute self employment. He further testified that he did not consider a referral fee to constitute a "commission" at the time he completed the form CA-8. Finally the appellant testified that self-employment either, but rather was just a friendly gesture, done to welcome Mr. Caruthers to the Macon Post Office.

I do not find that the appellant's testimony worthy of belief. In the first place, scrutiny of the appellant's letter to Mr. Caruthers makes it perfectly clear that the appellant was engaged in the real estate

business. Agency File, Tab 4c, Subtab 14. The letter reads in pertinent part:

> I would like to offer my professional services to you and provide you with information relative to best locations [sic] affordability and home-owner appreciation.
>
> Enclosed you will find one of my business cards. Please fee free to contact me at any tie between now and the time you plan to buy.

(Emphasis added). Moreover, the appellant's business card lists his affiliation with a realty company and identifies the appellant as a "Real Estate Consultant." Thus, I find the appellant's contention that he did not believe himself to be working in real estate during this period to be incredible. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 460-61 (1987) (testimony which is contradicted by other evidence and is inherently improbable is less worthy of belief).

I also find the appellant's testimony that he did not consider a referral fee to be a commission at the time he completed the form CA-8 to be unworthy of belief. The appellant has conceded, as he must, that a referral fee is a commission. Indeed, the appellant's referral fee was a percentage of the total commission. I do not believe that anyone with the appellant's knowledge, background, and experience would believe that a percentage of a real estate commission is not considered a commission.

The appellant's testimony that he was confused because the CA-8 did not ask him to list "referral fees" constitutes disingenuous semantics. The appellant's testimony was also misleading in other respects because

of semantics. For example, on direct examination the appellant stated that he did nothing to earn his referral fee beyond referring Mr. Adamson to a real estate agent, specifically testifying that he did not "show" any homes to mr. Adamson. On cross-examination, however, the appellant admitted that he visited a number of homes with Mr. Adamson and walked through them with him room by room. When pressed on the inconsistency, the appellant stated that, while he may have visited and walked through homes with Mr. Adamson, he didn't"show" any homes to him because he, the appellant, did not have a lock box key and, therefore, it was another real estate agent -- the one with the key who opened the door -- who "showed" the homes to Mr. Adamson.

Apparently, the appellant forgot that his oath included a promise not just to tell the truth, but to tell the whole truth. The appellant's sophistry aside, it is crystal clear to me that he know and understood that the CA-8 required him to list his work as a real estate agent and that this work, which entitled him to a referral fee, constituted working for a commission.[2] Accordingly, I find that the appellant made a false statement when he said "not applicable" on the portion of the form pertaining to commission work and self-employment, and that he did so with the specific intent to defraud.

2. The appellant falsified his form CA-1032.

In April 1990, OWCP contacted the appellant and

2

The appellant also argued that he did not think he had to list his real estate work on the CA-8 because his referral fee, while earned during the relevant time frame, was not paid to him until two months later, outside of the time frame encompassed by the CA-8. The appellant's argument is totally without merit since, appellant must "Show all activities, whether or not income resulted from your efforts."

directed him to complete form CA-1032, in order to determine his entitlement to continued benefits. The agency alleges that the appellant falsified his CA-1032 by failing to list his real estate activity and income, and for stating "N/A" for not applicable on a question asking him whether he received VA benefits from the Department of Veterans Affairs.

The CA-1032 asked the appellant to list all earnings from self employment during the preceding 15 months. The relevant time frame included the period when the appellant both earned and was paid the referral fee for the sale of the Adamson home discussed previously. I find that the appellant's failure to list his referral fee, which exceeded $1,500, on the form CA-1032 to constitute falsification for substantially the same reasons set forth above in my discussion of the separate falsification of the appellant's form CA-8: the appellant had to have known he was in the real estate business, and his referral fee clearly constituted income from self employment.[3]

As regards the VA benefits question, the appellant admits that he received VA benefits and that he should have stated that fact on his form CA-1032. He testified, however, that his mistake was an innocent one, and that he only failed to list his VA benefits on the form CA-1032 because the agency's Injury Compensation Specialist, Ms. Donna Chatham, had advised him that he did not need to list his VA benefits because those benefits were already a matter of record.

Ms. Chatham testified that she did not tell the appellant that he did not need to list his VA benefits on

---

3

it is uncontroverted that real estate agents are not "employed" by the real estate company with which they are affiliated but act as independent contractors and receive commissions.

form CA-1032. In fact, she explained that she could not have done so, because form CA-1032 is sent directly from OWCP to the employee. Ms. Chatham stated that she does discuss the preparation of forms CA-7 and 8 with employees, because those forms also require her signature acknowledging that she believes the information provided to be correct, but that she does not discuss the form CA-1032 with employees since the agency has no role in that form's preparation or processing. Ms. Chatham further testified that, while she did not give the appellant any advise concerning the form CA-1032, if she had been asked, she would have told the appellant to answer the form truthfully and would never have advised him to state not applicable to a question concerning VA benefits if he was receiving such benefits.

I credit Ms. Chatham's testimony over that of the appellant. Ms. Chatham was a totally disinterested witness. *See Hillen*, 35 M.S.P.R. at 459-60. Moreover, her testimony is probable while the appellant's is not. Id. at 461. Ms. Chatham would have had neither the motive nor the opportunity to advise the appellant not to mention his receipt of VA benefits on the form CA-1032. Indeed, I consider the suggestion that Ms. Chatham did so to be ludicrous. Ms. Chatham testified that receipt of VA benefits might reduce OWCP benefits. And, since the agency must reimburse OWCP for such benefits, Ms. Chatham, as an Injury compensation Specialist for the agency, would have been motivated to reduce the agency's OWCP liability, not to increase it.

In light of the foregoing, and the fact that the appellant was not truthful with regard to the form CA-8, *see Blocker v. Department of the Army*, 6 M.S.P.R. 467, 470 (1981), I find that the appellant's testimony is unworthy of belief. I further find that the appellant falsely stated "not applicable" on the form CA-1032, and that he did so with the specific intent to defraud.

3. The charge should not be dismissed as stale.

The appellant asserts that the removal action should be set aside because the charge against him is stale. It is undisputed that the appellant's misconduct occurred in 1989 and 1990, but that his removal was not proposed until 1994. Investigator John G. Kopernak, a Postal Inspector, testified that the investigation was delayed due to the poor health of the investigator originally assigned to the case. Investigator Kopernak testified that the original investigator became ill, but that her cases were never reassigned because she kept saying that she would be returning to work shortly. Unfortunately, she did not come back, and considerable time was lost. Investigator Kopernak further testified that, after he was assigned the appellant's case, it took him a great deal of time to complete the investigation because he already had a full case load of his own.

In any event, the record reflects that the Postal inspection Service completed its investigation and an Investigative Memorandum dated November 30, 1994, was forwarded to the appellant's supervisors who proposed his removal less than two weeks later. In *Mauro v. Department of the Navy*, 35 M.S.P.R. 86, 94 (1987), the Board considered a claim of staleness in which the alleged misconduct occurred in October 1986, but removal was not proposed until February 1988. The Board found that the charges were not stale because the agency's investigation was not completed until 1987 and the agency commenced the removal action within a reasonable time of learning of Mauro's misconduct. Id. Moreover, Mauro failed to prove that he had been prejudiced by the delay.

In my view, *Mauro's* reasoning is fully applicable to the case at bar. Although the appellant's misconduct occurred in 1989 and 1990, agency management took steps to propose the appellant's removal within two

weeks of the completion of the investigation. Moreover, the appellant has presented no evidence to show that he was prejudiced by the delay.

Accordingly, the dismissal of the charge as stale is inappropriate. *Id.; see Messersmith v. General Services Administration*, 9 M.S.P.R. 150, 155 (1981).

4. The agency action promotes the efficiency of the service.

In addition to providing the charge against the appellant, the agency must show that the action taken promoted the efficiency of the service. 5 U.S.C. § 7513(a). the first issue under this standard is whether there is a nexus between the charges and the efficiency of the service. The appellant has stipulated to nexus. Thus, I need not consider this issue further. 5 C.F.R. § 1201.63. *See Graham v. Department of the Air Force*, 46 M.S.P.R. 227, 237 (1990).

The Board has held that the falsification of an official document is serious offense that can warrant removal. *See Rohn v. Department of the Army*, 30 M.S.P.R. 157, 158-59 (1986). Whether a particular act of falsification warrants removal must be determined in light of the circumstances of each case. Barrett v. Department of the Interior, 65 M.S.P.R. 186, 202 (1994). In this case, Mr. Walter Flanagan, the deciding official and the Director of Human Resource Management, testified that, as a letter carrier, the appellant occupied a position of public trust. Mr. Flanagan testified that he opted for the removal penalty because he lost complete trust and confidence in the appellant.

The appellant notes that, during the four years the agency was investigating his misconduct, he was performing his duties in a satisfactory manner. And while I agree that this fact constitutes a significant

mitigating factor, I do not believe that the removal penalty is outside the bounds of reasonableness taking into account that the falsification of an OWCP application is an extremely serious offense, undertaken for personal gain. In addition, the falsification involved not one form, but two separate OWCP forms, executed months apart. Thus, it does not appear that these offenses could be characterized as a single lapse in judgment.

In light of the foregoing, therefore, I find that the removal penalty, while severe, is not outside the tolerable limits of reasonableness.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

RICHARD W. VATARIS
Administrative Judge